

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION**

**Denbra IP Holdings, LLC. d/b/a Nothing
Bundt Cakes**, a Nevada corporation,

Plaintiff,

vs.

**Kerri Thornton d/b/a All About Bundt
Cakes**, an individual

Defendant

Case No.: 20-cv-00813

Injunctive Relief Requested

Jury Demand Requested

**Complaint for Trademark Infringement
Under § 43(A) of the Federal Lanham Act and Unfair Competition
Injunctive Relief Requested**

Plaintiff, DENBRA IP HOLDINGS, d/b/a NOTHING BUNDT CAKES, a Nevada corporation (“Nothing Bundt Cakes”), for its claim against the Defendant KERRI THORNTON d/b/a ALL ABOUT BUNDT CAKES (“Thornton”), alleges as follows:

Jurisdictional Allegation

1. This Court has subject matter jurisdiction for this action under 28 U.S.C. §§ 1331 and 1338(a) and 15 U.S.C. § 1121 in that the case arises under § 43(a) of the Lanham Act for Trademark Infringement. This Court has ancillary jurisdiction to hear all pendant claims under 28 U.S.C. § 1367.

2. Venue is proper in this district under 28 U.S.C. §§ 1391(b) and (c).

Background Facts

3. At all times, Plaintiff Nothing Bundt Cakes was and now is, a Nevada limited liability company, formed and validly existing in the State of Nevada with its principal place of business in Addison, Texas, which is in Dallas County.

4. On information and belief, at all times described in this complaint, Defendant Thornton was, and now is, an individual with her principal residence in Celina, Texas, which is in Collin County.

5. Denbra IP Holdings is the owner of the subject trademarks and licenses the use of the trademarks to its operating company as well as its retail franchise stores. Nothing Bundt Cakes' principal business is the production and retail sale of Bundt-shaped cakes and novelty gift items, balloons, and gift baskets sold with its Bundt-shaped cakes, as well as providing retail bakery services whereby it sells its cakes and novelty items.

6. Nothing Bundt Cakes began its retail business in Las Vegas, Nevada, and began using its NOTHING BUNDT CAKES trademark in interstate commerce on September 8, 1997.

7. Initially, Nothing Bundt Cake operated its business out of one of the original two founders' kitchen.

8. Nothing Bundt Cakes opened its first two retail storefront bakeries in Las Vegas in October 1998 and June 2002.

9. Nothing Bundt Cakes opened its first bakery outside Nevada when it opened a bakery in Phoenix, Arizona. Since then, Nothing Bundt Cakes has expanded its business domestically and internationally throughout the entire U.S. and in parts of Canada. Today, it now operates over 300 franchise locations and collectively earns well over \$100 million annually in revenue.

10. The Nothing Bundt Cakes trademark has become well known and has achieved national fame. The Nothing Bundt Cakes brand is one of the most well-known brands for retail bakeries in the United States.

11. Since its inception, Nothing Bundt Cakes has used the name “Nothing Bundt Cakes” on every cake and packaging it has ever sold. It also uses the name on the store signs and menus of every retail bakery store it operates to advertise and promote its retail bakery services.

12. In July 2000, Nothing Bundt Cakes began filing federal trademark applications for the variations of its mark NOTHING BUNDT CAKES with the U.S. Patent and Trademark Office. The first registration was issued on March 18, 2003, for the word mark NOTHING BUNDT CAKES (U.S. Registration No. 2,697,008).

13. On October 9, 2007, the U.S. Patent and Trademark Office issued Registration No. 3,309,781 for the Nothing Bundt Cakes’ logo, as shown below. Nothing Bundt Cakes began using this mark in interstate commerce on October 15, 2006.



14. On August 5, 2014, the U.S. Patent and Trademark Office issued Registration No. 4,579,282 for a new Nothing Bundt Cakes’ linear logo, as shown below. Nothing Bundt Cakes began using this mark in interstate commerce on March 31, 2011, for signs for its retail bakeries.



15. On August 5, 2014, the U.S. Patent and Trademark Office also issued Registration No. 4,579,284 for a new Nothing Bundt Cakes’ stacked vertical logo, as shown below. Nothing Bundt Cakes also began using this mark in interstate commerce on March 31, 2011, for signs for its retail bakeries.



16. In addition to its highly valuable trademarks for its names and logos, since October 1998, Nothing Bundt Cakes has continuously used a unique frosting pattern in interstate commerce that distinguishes the cakes it advertises and sells from its competitors.

17. Specifically, Nothing Bundt Cakes' frosting pattern for its Bundt cakes consists of long, narrow strips of tubular ring-shaped frosting that expand radially outward from the center of each Bundt cakes to a point on the outer edge of the cake. The frosting strips are applied around the entire perimeter of the Bundt cake's ring shape. Two representative examples of this pattern are shown below:



18. Nothing Bundt Cakes used this unique frosting pattern on its large Bundt cakes and its smaller Bundt cakes known as Bundtlets for several years since first using it in October 1998. And after intentionally and consistently using the unique frosting

pattern for several years, the pattern became a unique identifier of the Bundt cakes from Nothing Bundt Cakes in the markets where it advertised and sold its cakes.

19. As the company expanded throughout the U.S. and developed a national brand, Nothing Bundt Cakes' frosting pattern became recognizable throughout the entire U.S.

20. The unique frosting pattern indicated to the consuming public that any Bundt cake with the unique frosting pattern originated solely from Nothing Bundt Cakes.

21. On September 11, 2007, Nothing Bundt Cakes filed for a federal trademark application on the Principal Register for the frosting pattern. On November 4, 2008, the U.S. Patent and Trademark Office issued Registration No. 3,526,479 for the frosting pattern under § 2(f) of 15 U.S.C. § 1051. This designation indicates that the mark has acquired secondary meaning among the consuming public that the frosting pattern is uniquely associated with Nothing Bundt Cakes.

22. Nothing Bundt Cakes not only utilizes local advertising campaigns where its franchises exist, but it also advertises internationally through its website located at nothingbundtcakes.com. Through the website, Nothing Bundt Cakes advertises and promotes its business and enables persons to order its cakes from anywhere in the world and have them delivered to any location within a 20-mile radius of a Nothing Bundt Cakes retail store.

23. All of Nothing Bundt Cakes' federally registered trademarks for use with dessert food products and the retail sale of baked goods and related items have been renewed and are currently in good standing with the U.S. Patent and Trademark Office.¹

24. Furthermore, under 15 U.S.C. § 1065, the U.S. Patent and Trademark Office has designated all of Nothing Bundt Cakes' federally registered trademarks as incontestable.

25. During its nearly 23 years of continuous use, Nothing Bundt Cakes has developed an international customer base and has built a brand that is synonymous with

¹ A copy of each issued federal trademark registration is attached as Exhibit A.

the highest in quality dessert foods, and in particular, cakes, as well as the highest in quality retail bakery services.

26. It also follows that Nothing Bundt Cakes uses its distinctive brand and cake frosting pattern for Bundt cakes to distinguish its business and services from other similar companies.

27. Nothing Bundt Cakes has spent hundreds of thousands of dollars to develop and protect its NOTHING BUNDT CAKES trademarks, its unique frosting pattern, and its brand.

28. Nothing Bundt Cakes believes that protecting and enforcing its trademark rights is crucial to maintaining its business and reputation for providing the highest quality dessert food products and retail bakery services.

29. Nothing Bundt Cakes relies extensively on its name and logo trademarks and its unique frosting pattern to direct its customers to: (1) the proper physical locations to patronize its business; and (2) its website for maintaining its customer base by enabling them to learn about its company and order its dessert foods.

30. Nothing Bundt Cakes also relies on its trademarks and unique frosting pattern to enable its current customer base to properly direct and refer new customers to its physical locations and website. By doing so, these new customers can obtain more information about Nothing Bundt Cakes' business.

31. When Nothing Bundt Cakes' current or future customer base is confused or misled by confusingly similar uses of its trademarks or its unique frosting pattern, Nothing Bundt Cakes may lose business due to the confusion.

The Defendant's Acts of Trademark Infringement

32. Thornton operates a retail bakery business under the name All About Bundt Cakes through a Facebook page and a website located at allaboutbundtcakes.com.

33. Thornton's primary business address is located in Celina, Texas, which is within the Dallas-Ft. Worth Metroplex area of Texas.

34. There are currently 21 Nothing Bundt Cakes franchises located in the Dallas-Ft. Worth Metroplex, and two new Nothing Bundt Cakes bakeries scheduled to open in Prosper and Weatherford, Texas. The Prosper store is located within 15 miles of Thornton's retail bakery location where she primarily serves her local customers.

35. Thornton's bakery business primarily advertises and sells Bundt cakes and related goods, and are identical to the goods Nothing Bundt Cakes advertises and sells.

36. On information and belief, Thornton only recently began operating her business under the mark ALL ABOUT BUNDT CAKES to advertise and promote her bakery services and her Bundt cakes dessert products in interstate commerce (in mid-August 2020) at the earliest.

37. According to GoDaddy.com's registry, Thornton registered the allaboutbundtcakes.com domain on August 20, 2020, which means it could not have advertised or promoted the ALL ABOUT BUNDT CAKES name on its website any earlier than that date.

38. During this same period, Thornton began using a tubular frosting pattern for her Bundt cakes that is substantially similar, if not identical, to the trademarked frosting pattern that Nothing Bundt Cakes uses. A sample of the frosting pattern that Thornton uses that was obtained from her Facebook storefront page is shown below.



39. At no time before Nothing Bundt Cakes' first use of its marks and frosting pattern did Thornton use her ALL ABOUT BUNDT CAKES name or the tubular frosting pattern for her Bundt cakes.

40. Therefore, Nothing Bundt Cakes has established first use and priority to the exclusive right to use its NOTHING BUNDT CAKES trademark and its unique tubular frosting pattern.

41. Any use of a confusingly similar mark as a trademark/service mark under federal trademark law in the markets where it has established priority of use would constitute an infringement of Nothing Bundt Cakes' intellectual property rights.

42. In mid-August, Nothing Bundt Cakes discovered Thornton's advertising efforts after it began receiving complaints from its local franchises about her use of the

name ANYTHING BUNDT CAKES for her business name and her unauthorized use of the infringing frosting pattern on her Bundt cakes.

43. Shortly thereafter, Nothing Bundt Cakes' counsel sent a demand letter to Thornton alleging that: (1) her use of the mark ANYTHING BUNDT CAKES was likely to cause confusion with their NOTHING BUNDT CAKES marks; and (2) her use of her tubular frosting pattern on her Bundt cakes was also likely to cause confusion with Nothing Bundt Cakes' trademarked frosting pattern.

44. The letter threatened her with a lawsuit for trademark infringement if she did not stop using the infringing mark.

45. Shortly thereafter, Thornton changed her business name to ALL ABOUT BUNDT CAKES, but she continued to use the infringing frosting pattern.

46. In early September, Nothing Bundt Cakes sent a second demand letter alleging the same infringement allegations.

47. Since that time, Nothing Bundt Cakes has received additional complaints from its local franchisees of Thornton's unauthorized use.

48. As of this complaint's filing date, Thornton's business remains operational, and she is still using her name and the infringing frosting pattern.

Causes of Action

Count 1 – Trademark Infringement – Nothing Bundt Cakes Word Mark (15 U.S.C. § 1125(a))

49. Nothing Bundt Cakes incorporates all previous statements as if fully stated herein.

50. In September 1997, Nothing Bundt Cakes began using the NOTHING BUNDT CAKES mark in interstate commerce with dessert foods, namely cakes, and retail bakery services. Nothing Bundt Cakes incorporates the NOTHING BUNDT CAKES mark with its goods and services in three other logos that it uses extensively.

51. From their first use date until the present day, Nothing Bundt Cakes has continuously used the NOTHING BUNDT CAKES name and logo marks with its dessert foods and advertising and promoting its retail bakery services.

52. Nothing Bundt Cakes owns federally registered trademarks for its NOTHING BUNDT CAKES word mark and logos that incorporate the word mark under U.S. Registration Nos. 2,697,008; 3,309,781; 4,579,282; and 4,579,284.

53. Nothing Bundt Cakes has spent substantial sums promoting and advertising its dessert foods, cakes, and retail bakery services under the NOTHING BUNDT CAKES name and logo marks in interstate commerce and throughout the entire United States through over 300 retail franchise locations.

54. On information and belief, in August 2020, Thornton began using the name ALL ABOUT BUNDT CAKES on dessert foods, namely Bundt cakes, and to advertise and promote its retail bakery services in interstate commerce.

55. The respective parties provide substantially similar or identical goods and services to the public in interstate commerce.

56. Thornton's acts of using the ALL ABOUT BUNDT CAKES trademark has caused and is likely to continue to cause confusion, mistake, or deception in that the public is likely to mistakenly believe that the goods and services Thornton offers under the ALL ABOUT BUNDT CAKES trademark have their origin or source with Nothing Bundt Cakes, or is in some manner approved by, associated with, sponsored by or connected with Nothing Bundt Cakes, all in violation of 15 U.S.C. § 1125(a) et seq.

57. Upon information and belief, Thornton acted willfully and with the intent to confuse and deceive the public.

58. Thornton's acts have damaged Nothing Bundt Cakes' business, reputation, and goodwill and have interfered with Nothing Bundt Cakes' use of its names and marks.

59. Thornton's acts have already caused actual confusion in the marketplace among consumers.

60. Moreover, Thornton has caused, and unless enjoined, will continue to cause, irreparable harm and injury to Nothing Bundt Cakes for which there is no adequate remedy at law.

**Count 2 – Trademark Infringement – Nothing Bundt Cakes Frosting Pattern
(15 U.S.C. § 1125(A))**

61. Nothing Bundt Cakes incorporates all previous statements as if fully stated herein.

62. In September 1997, Nothing Bundt Cakes began using a unique tubular frosting pattern to decorate the Bundt cakes it sold in interstate commerce.

63. From its first use date until the present day, Nothing Bundt Cakes has continuously and extensively used its unique tubular frosting pattern with its dessert foods, namely Bundt cakes.

64. Nothing Bundt Cakes owns a federally registered trademark for its unique tubular frosting pattern under U.S. Registration No. 3,526,479.

65. Nothing Bundt Cakes has spent substantial sums promoting and advertising its dessert foods and cakes to deliberately associate the unique tubular frosting pattern with its Bundt cakes by using the unique tubular frosting pattern in interstate commerce and throughout the entire United States through over 300 retail franchise locations.

66. On information and belief, in August 2020, Thornton began using a tubular frosting pattern on its Bundt cakes that is substantially similar or identical to the trademarked tubular frosting pattern that Nothing Bundt Cakes uses in interstate commerce.

67. The respective parties provide substantially similar or identical goods and services to the public in interstate commerce.

68. Thornton's acts of using its tubular frosting pattern have caused and are likely to continue to cause confusion, mistake, or deception in that the public is likely to believe mistakenly that the Bundt cakes Thornton offer originate from Nothing Bundt

Cakes, or is in some manner approved by, associated with, sponsored by or connected with Nothing Bundt Cakes, all in violation of 15 U.S.C. § 1125(a) et seq.

69. Upon information and belief, Thornton acted willfully and with the intent to confuse and deceive the public.

70. Ultimate Thornton's acts have damaged Nothing Bundt Cakes' business, reputation, and goodwill and have interfered with Nothing Bundt Cakes' use of its names and marks.

71. Thornton's acts have already caused actual confusion in the marketplace among consumers.

72. Moreover, Thornton has caused, and unless enjoined, will continue to cause, irreparable harm and injury to Nothing Bundt Cakes for which there is no adequate remedy at law.

Count 3 – Common Law Unfair Competition (Word Mark and Logos)

73. Nothing Bundt Cakes incorporates all previous statements as if fully stated herein.

74. On information and belief, at some time in August 2020, and continuously since that time, Thornton has utilized a trademark (ANYTHING BUNDT CAKES and related logo) that is confusingly similar to Nothing Bundt Cakes' NOTHING BUNDT CAKES trademarks.

75. By engaging in these acts, Thornton has thereby engaged in unfair trade practices and unfair competition under § 43(a) of the Lanham Act against Nothing Bundt Cakes.

76. Thornton has damaged Nothing Bundt Cakes by this behavior and will continue to be damaged by the action.

77. There is a substantial likelihood that Nothing Bundt Cakes will succeed on the merits of this action.

Count 4 – Common Law Unfair Competition (Frosting Pattern)

78. Nothing Bundt Cakes incorporates all previous statements as if fully stated herein.

79. On information and belief, at some time in August 2020, and continuously since that time, Thornton has utilized a confusingly similar frosting pattern to decorate Bundt cakes that it sells in commerce that is confusingly similar to the trademarked frosting pattern that Nothing Bundt Cakes uses to decorate its Bundt cakes that it sells in interstate commerce.

80. By engaging in these acts, Thornton has thereby engaged in unfair trade practices and unfair competition under § 43(a) of the Lanham Act against Nothing Bundt Cakes.

81. Thornton has damaged Nothing Bundt Cakes by this behavior and will continue to be damaged by the action.

82. There is a substantial likelihood that Nothing Bundt Cakes will succeed on the merits of this action.

Demand for Jury Trial

Nothing Bundt Cakes demands a jury trial on all issues so triable.

Prayer

WHEREFORE, Plaintiff Nothing Bundt Cakes prays for judgment against Thornton, as follows:

- A. For damages in an amount to be proven at trial for trademark infringement.
- B. For injunctive relief under § 43(a) of the Lanham Act and related federal trademark laws.
- C. For costs and attorney's fees under federal trademark laws as this is an exceptional case that Thornton has willfully caused.
- D. For interest on any fees and costs at the statutory rate of 10% per annum, until paid in full;

E. For a preliminary and permanent injunction against Thornton ordering it to cease any further use of the ANYTHING BUNDT CAKES mark, or any other name or service mark that is likely to cause confusion or mistake with Nothing Bundt Cakes' NOTHING BUNDT CAKES trademarks among consumers.

F. For a preliminary and permanent injunction against Thornton ordering it to cease any further use of the frosting pattern it currently uses to decorate its Bundt cakes or any other similar frosting pattern that is likely to cause confusion or mistake with Nothing Bundt Cakes' trademarked frosting pattern among consumers.

G. For any other and relief as the Court may consider just and equitable.

Dated this 22nd day of October, 2020.

Bv /Theodore G. Baroodv

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